Yap Choon Kit v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42–71 OF 2005
NALLINI PATHMANATHAN JC
15 JULY 2008

Criminal Law — Penal Code — s 474 — Possession of forged credit cards with intention to fraudulently use same as genuine documents — Whether trial judge erred in concluding that prosecution made out prima facie case — Whether necessary for trial judge to give reasons for conclusion — Whether ingredients essential to proof of evidence made out — Whether burden of proof placed on accused

Acting on information received a police party led by Assistant Superintendent Ng Thean Leng went to a house at Kampung Baru Ampang ('the house'). The police then searched the house which was then occupied by the accused and his parents and recovered from one of the rooms, alleged to be the accused's room ('the room') a total of 49 credit cards all bearing different names and numbers and none of which carried the accused's name. Additionally they found and seized three heavy machines ('the heavy machines') believed to be utilised to read magnetic data on credit cards and to emboss or imprint data on credit cards. The accused was thereafter charged with having committed an offence punishable under s 474 of the Penal Code ('Code') that is having in his possession 26 credit cards that were forged, knowing them to be forged and intending to fraudulently use the credit cards as genuine documents. The charge against the accused related to 26 of the 49 cards recovered in the room and the evidence as adduced by the prosecution showed that these 26 credit cards were found in two different receptacles in the accused's room. The two different receptacles were a black bag found on a desk in the room which contained 19 credit cards and a black wallet with a Public Bank logo that contained another seven credit cards. At the trial it was not in issue that the 26 credit cards were in fact forged and at the close of the prosecution case the trial judge concluded that a prima facie case had been made out under s 474 of the Code. In his defence the accused testified and maintained that he did not live in the house every day and that the room that was alleged to be his room was actually a guest room used by relatives who visited. The accused also gave evidence that the room had in fact been occupied by one Ah Keong earlier in the day and that the Ah Keong had been arrested the same night. The accused also denied any knowledge of the black bag and the wallet in the room, stating that none of his personal items were

found among any of the seized items. After giving due consideration to the accused's defence the trial judge rejected the evidence relating to Ah Keong because it was only raised at the defence stage and concluded that the defence had failed to raise a reasonable doubt in respect of the prosecution's prima facie case. This was an appeal against the decision of the sessions court judge to convict the accused of having committed an offence punishable under s 474 of the Code. The accused submitted that the trial judge had erred, inter alia, in failing to provide reasons to explain how she arrived at the conclusion that a prima facie case had been made out by the prosecution, failing to assess whether the ingredients essential to the proof of this offence were made out, by placing the burden of proof on the accused and by wrongfully rejecting the accused's defence.

Held, allowing the appeal and acquitting and discharging the accused:

(1) The burden imposed on a trial judge sitting alone had not been adhered to in the instant case. As such it was not possible to ascertain whether the ingredients or elements of an offence under s 474 of the Code had been made out on the basis of the evidence adduced by the prosecution. Since no basis was recorded for the conclusion that a prima facie case was made out, it was necessary to consider at this appellate stage whether in fact on the record of evidence before this court, the ingredients of an offence under s 474 of the Code were made out. An appellate court is empowered to interfere with the decision and findings of the trial court where, inter alia, the findings are against the weight of the evidence adduced. When a trial judge does not evaluate and assess critically the evidence adduced and fails as in the instant case to explain the basis for the reasoning and ultimate decision, the judgment is rendered defective. Thus in the instant case, a prima facie case was not made out and the prosecution's case failed (see paras 16 & 44)

(2) Although a considerable amount of time was expended on establishing that the room in which the credit cards were found was used solely by the accused, with a view to proving that he had possession of the room there appeared to be no evidence directly linking the accused to the room and therefore conclusively establishing that he had possession of the room. In any case even if the accused's possession of the room were established this would not have answered the question of whether the accused had possession of the 26 forged credit cards. Possession in relation to the credit cards is only established by evidence that the accused had custody and control of the two receptacles ie the black bag and the wallet containing the credit cards and that he had knowledge that these two receptacles contained the 26 forged credit cards. However, there was no evidence found to warrant an inference that the

black bag and the wallet belonged to the accused. The only evidence was that they were in a room utilised by him and this was insufficient to establish physical custody and control. In addition there was no direct evidence to show that the accused had knowledge of the contents of the black bag and the wallet, as comprising 26 forged credit cards (see paras 28–29, 35–36).

(3) The trial judge found that the existence of the heavy machines in the room showed that the accused had knowledge of the forged credit cards in his room. Although the existence of the heavy machines might suggest that he knew of their existence it did not assist in establishing that the accused had physical control and custody as well as knowledge of the 26 forged credit cards in the two receptacles (see paras 36 & 41).

(4) Once possession of the forged credit cards was established then the requisite intent required to prove the commission of an offence under s 474 could be inferred from the circumstances surrounding the event. However, as the element of possession had not been established in the instant case, it followed that the element of intent also did not arise for consideration (see para 43).

(5) In this case, there was no evaluation of the evidence adduced by the prosecution but a critical evaluation of the accused's version of events was conducted. The consequence of undertaking a thorough evaluation of the defence case while adopting in toto the evidence adduced during the prosecution's case, was that the burden of proof in this case was effectively imposed on the accused rather than on the prosecution. The net effect of this was to effectively reverse the burden of proof and this resulted in a miscarriage of justice (see para 45).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, sepasukan polis yang diketuai oleh Penolong Penguasa Ng Thean Leng telah pergi ke sebuah rumah di Kampung Baru Ampang ('rumah'). Pihak polis kemudiannya memeriksa rumah tersebut yang didiami oleh tertuduh dan ibu bapanya telah menjumpai dari salah satu bilik yang didakwa sebagai bilik tertuduh ('bilik') sejumlah 49 kad kredit yang menunjukkan nama-nama dan nombor-nombor yang berbeza dan tiada satu pun mengandungi nama tertuduh. Selanjutnya mereka telah menjumpai dan merampas peralatan berat ('peralatan berat') yang dipercayai digunakan untuk membaca data magnetik di kredit kad dan untuk mencetak timbul atau mengimprin data di atas kad-kad kredit. Selanjutnya, tertuduh telah didakwa melakukan kesalahan yang boleh dihukum di bawah s 474 Kanun Keseksaan ('Kanun') iaitu memiliki 26 kad kredit palsu, mengetahuinya adalah palsu dan berniat untuk secara fraud menggunakan kad-kad kredit tersebut sebagai dokumen yang tulen. Pertuduhan terhadap

tertuduh berkaitan dengan 26 daripada 49 kad kredit yang dijumpai di dalam dua bekas berlainan dalam bilik tertuduh. Dua bekas berlainan adalah beg hitam yang dijumpai di atas meja di dalam bilik yang mengandungi 19 kad kredit dan satu dompet hitam dengan logo Public Bank yang mengandungi tujuh kad kredit yang lain. Semasa perbicaraan bukanlah menjadi isu bahawa 26 kad kredit adalah palsu dan ketika di akhir kes pendakwaan hakim bicara telah menyimpulkan bahawa kes prima facie telah dibuktikan di bawah s 474 Kanun. Dalam pembelaan tertuduh yang memberikan keterangan dan mempertahankan bahawa dia tidak tinggal di dalam rumah setiap hari dan bilik tersebut yang didakwa sebagai biliknya sebenarnya adalah bilik tetamu yang digunakan oleh saudara-mara yang bertandang. Tertuduh juga memberikan keterangan bahawa bilik tersebut sebenarnya didiami oleh seseorang yang bernama Ah Keong di awal hari tersebut dan Ah Keong telah ditangkap pada malam yang sama. Tertuduh juga menafikan yang berpengetahuan berkenaan dengan beg hitam dan dompet di dalam bilik, dengan menyatakan bahawa tiada satu pun barangan persendiriannya dijumpai di antara barangan yang dirampas. Selepas memberikan pertimbangan kepada pembelaan tertuduh, hakim bicara telah menolak keterangan berkenaan dengan Ah Keong kerana ia hanya dibangkitkan semasa peringkat pembelaan dan menyimpulkan bahawa pembelaan telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes prima facie pihak pendakwaan. Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen yang mensabitkan tertuduh kerana melakukan kesalahan yang boleh dihukum di bawah s 474 Kanun. Tertuduh menghujahkan bahawa hakim bicara telah terkhilaf, antara lain, gagal menyediakan alasan yang menjelaskan bagaimana beliau dapat menyimpulkan bahawa satu kes prima facie telah dibuktikan oleh pihak pendakwaan, gagal untuk menilai sama ada elemen penting untuk membuktikan kesalahan tersebut telah dibuktikan, dengan meletakkan beban pembuktian terhadap tertuduh dan secara salah menolak pembelaan tertuduh.

Diputuskan, membenarkan rayuan, membebaskan dan melepaskan tertuduh:

(1) Beban yang dikenakan oleh hakim bicara yang mengendalikan secara sendirian adalah tidak dipatuhi di dalam kes ini. Oleh itu adalah tidak mustahil untuk memastikan sama ada ramuan-ramuan atau elemen-elemen kesalahan di bawah s 474 Kanun telah dibuktikan berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan. Oleh kerana tiada asas direkodkan bagi kesimpulan bahawa kes prima facie telah dibuktikan, adalah penting untuk mempertimbangkan semasa peringkat rayuan ini sama ada di dalam rekod keterangan di hadapan mahkamah ini, elemen-elemen bagi kesalahan di bawah s 474 Kanun telah dibuktikan. Mahkamah Rayuan mempunyai kuasa untuk

campur tangan dengan keputusan dan dapatan hakim bicara di mana, antara lain, dapatan adalah bertentangan dengan berat keterangan yang telah dikemukakan. Apabila hakim bicara tidak menilai dan menaksir secara kritikal keterangan yang telah dikemukakan dan gagal seperti di dalam kes ini untuk menjelaskan asas bagi alasan dan keputusan utama, penghakiman adalah dikira cacat. Oleh itu di dalam kes ini, kes prima facie tidak dibuktikan dan kes pihak pendakwaan adalah gagal (lihat perenggan 16 & 44).

(2) Walaupun banyak masa digunakan untuk membuktikan bahawa bilik yang mana kad-kad kredit ditemui hanya digunakan oleh tertuduh, dengan menggambarkan pembuktian bahawa dia mempunyai milikan terhadap bilik tersebut, jelas tidak ada keterangan yang menghubungkan tertuduh secara terus kepada bilik tersebut dan oleh itu secara konklusif membuktikan bahawa dia mempunyai milikan bilik tersebut. Dalam mana-mana kes, walaupun jika milikan tertuduh terhadap bilik tersebut telah dibuktikan ini tidak menjawab persoalan sama ada tertuduh mempunyai milikan terhadap 26 kad kredit palsu tersebut. Milikan berkenaan dengan kad-kad kredit hanya dibuktikan oleh keterangan bahawa tertuduh mempunyai jagaan dan kawalan dua bekas iaitu beg hitam dan dompet yang mengandungi kad-kad kredit dan oleh itu tertuduh mempunyai pengetahuan bahawa dua bekas tersebut mengandungi 26 kad kredit palsu. Walau bagaimanapun, tidak terdapat keterangan dijumpai untuk membolehkan inferens bahawa beg hitam dan dompet adalah kepunyaan tertuduh. Satu-satunya keterangan adalah ianya di dalam bilik yang digunakan olehnya dan ini tidak mencukupi untuk membuktikan jagaan dan kawalan fizikal. Selanjutnya, tidak terdapat keterangan langsung untuk menunjukkan bahawa tertuduh mempunyai pengetahuan terhadap kandungan beg hitam dan dompet yang mengandungi 26 kad kredit palsu (lihat perenggan 28–29, 35–36)

(3) Hakim bicara telah mendapati bahawa, kewujudan peralatan berat di dalam bilik tersebut menunjukkan bahawa tertuduh mempunyai pengetahuan berkenaan dengan kad-kad kredit palsu di dalam biliknya. Walaupun kewujudan peralatan berat tersebut mungkin menunjukkan bahawa tertuduh tahu ia wujud tidak membantu dalam membuktikan bahawa tertuduh mempunyai kawalan fizikal begitu juga pengetahuan terhadap 26 kad kredit palsu di dalam dua bekas tersebut (lihat perenggan 36 & 41).

(4) Apabila milikan kad-kad kredit palsu tersebut telah dibuktikan niat yang sewajarnya yang diperlukan untuk membuktikan perbuatan kesalahan di bawah s 474 boleh disimpulkan daripada keadaan sekeliling kejadian. Walau bagaimanapun, oleh kerana elemen milikan

tidak dibuktikan di dalam kes ini, ia diikuti bahawa elemen niat juga tidak timbul untuk dipertimbangkan (lihat perenggan 43).

(5) Dalam kes ini, tidak terdapat penilaian keterangan yang telah dikemukakan oleh pihak pendakwaan tetapi penilaian yang kritikal terhadap versi kejadian tertuduh dilakukan. Hasil daripada usaha penilaian yang teliti terhadap kes pembelaan sementara mengambil sepenuhnya keterangan yang telah dikemukakan semasa kes pihak pendakwaan, adalah bahawa beban pembuktian di dalam kes ini adalah secara efektif dikenakan terhadap tertuduh daripada pihak pendakwaan. Kesan sebenar perkara ini adalah untuk membalikkan beban pembuktian secara efektif dan ini menyebabkan ketidakadilan (lihat perenggan 45).]

Notes

For a case on s 474 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1984.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153, HC (refd)
Chiah Tian v Rex [1937] 6 MLJ 105, HC (refd)
Hoo Chee Keong v PP (No 2) [2000] 5 MLJ 448, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360, HC (refd)
Periasamy v PP [1966] 1 MLJ 138, FC (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346, HC (refd)
PP v Hoo Chee Keong [1997] 4 MLJ 451, HC (refd)
Tee Thian See v Pendakwa Raya [1996] 3 MLJ 209, HC (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183, SC (refd)

Legislation referred to

Criminal Procedure Code s 173, 173(f), (g)
Evidence Act 1950 s 8(2)
Penal Code ss 466, 467, 472, 474
Penal Code [India] s 474

SS Gooi (Gooi & Azura) for the appellant.
Azar Irwan bin Mohd Ariffin (Attorney General's Chambers) for the respondent.

Nallini Pathmanathan JC:

[1] This is an appeal against the decision of the sessions court judge whereby Yap Choon Kit, the appellant, ('Yap') was convicted of having

committed an offence punishable under s 474 of the Penal Code ('Code') and sentenced to six years' imprisonment. In the sessions court, Yap was charged as follows:

> That you, on 8 June 1998, at about 11.50pm in house No 388A, Jalan 10, Kampung Baru Ampang, Ampang, in the state of Selangor, were found to have in your possession valuable security that was false namely twenty six credit cards as follows:
>
> (The individual particulars of each of the twenty six credit cards are set out) ie, documents of the description mentioned in section 467 of the Code, knowing that these documents are false and intending that the same shall fraudulently be used as genuine and as such you have committed an offence that is punishable under section 474, Penal Code.

[2] Yap claimed trial.

THE SALIENT FACTS

[3] A brief outline of the facts adduced by the prosecution were that on 8 June 1998, a police party comprising four persons, led by assistant superintendant Ng Thean Leng ('SP2'), acting on information received, went to a house at No 388A, Jalan 10, Kampung Baru Ampang, reaching their destination at about 11.50pm. On reaching the house they were let in by a Chinese male who, it was subsequently found, was Yap. SP2 introduced himself as a police officer from Bukit Aman. There were three persons in the house at that time, namely Yap and his parents. The house comprised two rooms, situated immediately to the right of the house upon entry, a hall and with the kitchen and the bathroom at the back of the house. Yap approached the police and identified himself upon being asked to do so. The police then searched the house, beginning with the first room.

[4] They recovered from this room a total of 49 credit cards bearing different names and numbers, none of which carried Yap's name. Of these 49 different cards, 26 were found in a black bag on a table, 11 in a black wallet bearing the Public Bank logo on the floor alongside the table, and 12 cards in a drawer of the table. Additionally they found and seized three machines, namely a 'skimmer', an 'embosser' and an 'imprinter', machines believed to be utilised respectively to read magnetic data on the credit cards and to emboss or imprint data on credit cards. The other documents that were found in the room on the floor near the desk were three computer discs, a calculator, a note book containing, inter alia, numbers of accounts, and 43 pieces of paper with information pertaining to account numbers. A search of the rest of the house yielded no further items.

A **[5]** The charge against Yap relates to 26 of the 49 cards recovered. Of these 26 cards comprising the subject-matter of the charge, it was found (on a comparison of the contents of the search list against the particulars of the cards in the charge itself) that 19 were contained in the black bag on the table, and seven in the wallet found on the floor next to the desk.

B

[6] At the trial of this matter, some 11 witnesses from various banks testified to the effect that the 26 credit cards forming the subject-matter of the charge were in fact, forged. In this appeal it is not in issue that the twenty six credit cards were in fact forged, and therefore the evidence of these C witnesses does not require further examination.

[7] On the premise that the credit cards were found in a room alleged to be occupied by Yap and the evidence of the eleven bank witnesses to the effect that the cards were forged, the prosecution sought to establish a prima facie D case under s 474 of the Code in the court below. The trial judge, who took over conduct of this case at almost the close of the prosecution case, determined that a prima facie case had been made out, and called for defence.

E **[8]** In his defence, Yap testified and maintained that he had been arrested and handcuffed immediately upon the police entering the house. One of the two rooms was occupied by his parents, whereas the other, he testified initially, was used by his younger sister, relatives or himself. However he then went on to say that it was used as a guest room for relatives and his sister. Yap F also stated that he did not live in the house every day, but resided elsewhere with his girlfriend. He conceded that the room not occupied by his parents but was utilised by whichever sibling was staying the night. Yap denied any knowledge of the black bag and the wallet found in the room, stating that none of his personal items were found in either of these seized items. Yap also G maintained that a friend of his, one Ah Keong, had utilised the room in question that day. Yap was so informed by his mother, as he himself had been out at work all day, as a painter. According to Yap, the said Ah Keong was arrested the same night at Jalan Loke Yew, after Yap had directed the police there. SP2 initially denied, then stated that he could recall no such arrest.

H

THE FINDINGS OF THE TRIAL JUDGE

[9] In her grounds of the judgment, the trial judge set out the outline facts pertaining to the prosecution case. She then went on to conclude that at the I close of the prosecution's case, a prima facie case had been made out. However, no reasons were given as to why such a conclusion was reached. Nor was there any attempt made to analyse or evaluate the evidence adduced during the course of the prosecution's case, to assess whether the requisite elements of the charge had been met.

[10] The trial judge did however, give due consideration to Yap's defence. She concluded that the defence failed to raise a reasonable doubt in respect of the prosecution's prima facie case on the following grounds:

(a) the evidence relating to 'Ah Keong' was only raised at the defence stage but not during the prosecution's case by way of cross-examination;

(b) Yap's mother had not given evidence in relation to the existence and activities of Ah Keong during the day on 8 June 1998. As such Yap's version of events amounted to hearsay which was could not be utilised;

(c) no explanation was tendered in respect of the large, heavy machines, namely the embosser, skimmer and imprinter found in the room. The failure of Yap to account for the presence of these machines in the room, which she had concluded to be his, coupled with his lack of knowledge as to whether they belonged to his younger sister or Ah Keong all contributed to her finding that the defence was a sham, created to provide a defence to the charges preferred against Yap;

(d) the trial judge rejected Yap's evidence that he did not reside at the subject house as in his evidence-in-chief he had stated that in 1998 he lived in Kampung Baru Ampang in a house at No 388, Jalan 10. The address on the charge sheet matched this address too, and she therefore concluded that Yap lived there.

YAP'S SUBMISSIONS

[11] While numerous grounds were set out in the appellant's petition, Mr Gooi, learned counsel for Yap, focused on a few salient grounds in his submissions which can be summarised as follows; the learned judge, he submitted, had erred in:

(a) failing to provide any reasoned basis for her decision that a prima facie case had been made out;

(b) concluding that a prima facie case had been made out, when in fact reasonable doubts had been created at the close of the prosecution stage, particularly with regard to the issue of 'possession';

(c) failing to assess whether the ingredients of the charge under s 474 of the Code had been proved;

(d) placing the burden of proof on the accused; and

(e) wrongfully rejecting Yap's defence.

THE RESPONDENT'S SUBMISSIONS

[12] The respondent replied to these issues, contending that:

(a) the learned judge had set out the facts in her judgment which formed the basis for her decision that a prima facie case had been made out;

A (b) the issue of 'possession' of the credit cards could be proved by way of inference from the circumstantial evidence adduced during the prosecution's case. This evidence included Yap's statements pertaining to his occupation of the subject room, the presence of heavy machinery and Yap's personal documents in the room;

B (c) accordingly there was sufficient evidence to establish a prima facie case; and

(d) there was no error occasioned in the rejection of Yap's defence.

C ISSUES IN THE APPEAL

[13] From the foregoing, the issues in this appeal are:

D (i) is it necessary for the learned trial judge to give reasons or explain how she arrived at the conclusion that a prima facie case had been made out?;

(ii) was a prima facie case made out on the evidence adduced in the course of the prosecution's case? This includes an examination of whether the E ingredients essential to the proof of this offence were made out; and

(iii) what is the burden of proof on Yap?

Issue (i) *Is it necessary for the learned trial judge to give reasons or explain how* F *she arrived at the conclusion that a prima facie case had been made out?*

[14] A reading of the grounds of judgment show that while the facts of the prosecution case are set out, there is no attempt made to analyse or maximally G evaluate the evidence of the prosecution witnesses. Section 173(f) and (g) of the Criminal Procedure Code do not expressly stipulate that reasons need to be accorded when a court considers whether or not a prima facie case has been made out. However it is clear from these sections that the court is bound to give consideration to the evidence adduced and to then arrive at a decision H as to whether the accused person may be acquitted of the charge preferred against him, or whether he should be called upon to enter defence in respect of the charge as preferred or amended by the court. A decision is made at this crucial stage of the trial, which has a significant bearing on the outcome. It therefore follows that such a decision should be reached after a thorough and I comprehensive evaluation of the evidence has been undertaken.

[15] The burden imposed on a trial judge sitting alone has been clearly elucidated in, inter alia, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 (CA) where Gopal Sri Ram JCA explained the

steps to be undertaken. As stated in that case, the statements below would be equally applicable to a trial under s 173 of the CPC:

> ... It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

And in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 Augustine Paul JCA (as His Lordship then was) delivered the decision of the Federal Court as follows:

> ... A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by rebuttal evidence. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* 11th Ed as:
>
> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
> >
> > The result is that the force of the evidence adduced must be such that if unrebutted, it is sufficient to induce the court to believe in the existence of the facts as stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. *In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.*
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> > *As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3)*. Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. *Since the court, in ruling that a prima facie case has been made out must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted.*
> >
> > The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[16] In the instant case the aforesaid formulae have not been adhered to. The net result is two fold:

(a) it is not possible to ascertain from the grounds of judgment whether the ingredients or elements of an offence under s 474 of the Code have been made out on the basis of the evidence adduced by the prosecution;

(b) the finding itself, namely that a prima facie case was made out, is in issue, as it is not evident from the record that there was basis for such a conclusion; and

(c) the bare finding that a prima facie case has been made out results, in the instant case, in the burden of proof being erroneously placed on the accused during the defence case;

[17] As no basis was recorded for the conclusion reached, it is necessary to consider at this appellate stage, whether in fact, on the record of evidence before this court, the ingredients of an offence under s 474 of the Code were made out, as set out in issue (i) above.

Issue (ii) *Was a prima facie case made out on the evidence adduced in the course of the prosecution's case? This includes an examination of whether the ingredients essential to the proof of this offence were made out*

Gour's Penal Law of India, Vol 4, (10th Ed) at p 3970 sets out the requisite ingredients of s 474 of the Indian Penal Code which is pari materia with s 474 of the Code (save for punishment), they are:

(1) that the document was forged;

(2) that it was in the possession of the accused;

(3) that he held its possession knowing it to be forged and intending that the same shall be used fraudulently or dishonestly as a genuine document; and

(4) that the document was one described in ss 466 or 467.

[18] In the context of the present case therefore the prosecution had to establish that:

(1) the 26 credit cards set out in the charge were forged;

(2) that the 26 credit cards were in the possession of the accused;

(3) that the accused held possession of those 26 credit cards knowing them to be forged and intending that those cards be used fraudulently or dishonestly as a genuine document; and

(4) that the 26 credit cards were documents described in s 467 of the Code.

[19] Ingredient (i) is not in issue in this appeal, as both Yap and the respondent conceded that vide the evidence of SP3 to SP13, it had been shown that the 26 credit cards comprising the subject-matter of the charge, were in fact, forged.

Ingredient (ii) *Were the 26 credit cards in the possession of the accused?*

[20] The appellant contended strongly through his counsel that this element had not been made out while the respondent maintained that six indicia allowed for an inference of 'possession' of those 26 credit cards to be drawn. The evidence as adduced (as set out above) shows that the 26 credit cards utilised for the purposes of this charge were found in two different receptacles in the first room, alleged to be that of Yap's, in the subject house. The two different receptacles were a black bag found on a desk in the room which contained 19 cards, and a black wallet with a Public Bank logo, containing seven cards.

[21] From a reading of the record of evidence, it appears that a considerable amount of time was expended on establishing and refuting whether the room in which these items were found was used solely by Yap or otherwise, with a view to proving that he had 'possession' of the room.

[22] A perusal of the evidence of SP2 shows that objection was taken to certain statements alleged to have been made by Yap as to the identity of the occupant of the first room where the subject credit cards were eventually found. Learned counsel for Yap had argued that these statements were inadmissible in evidence, on the grounds that Yap was effectively under 'arrest' from the time the police arrived at the front door and introduced themselves. This was because their visit to the house was premised on information received in respect of the alleged commission of an offence. No caution was administered by SP2 or any member of his police party after they had entered the house and introduced themselves. It was therefore contended that in the absence of the administration of any form of caution, all answers by Yap to questions posed by SP2 as to the lay-but of the house, were inadmissible, as he was effectively under 'arrest' from that point in time. The respondent argued otherwise, namely that the conduct of Yap in pointing out the first room when queried by SP2 was admissible under s 8(2) of the Evidence Act 1950, as evidence of 'subsequent conduct'.

[23] This warrants a consideration of whether or not Yap was effectively 'under arrest' when he gave answers and pointed out a room when questioned by SP2. If he was under arrest, then those statements including his act of

pointing out the room in question would be inadmissible. If on the other hand he was not under 'arrest' when SP2 queried him, his statements would be admissible. In *Public Prosecutor v Kang Ho Soh* [1992] 1 MLJ 360 Shanker J explained the issue as follows:

> ... *But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case.*
>
> ...
>
> *In the present case, the evidence makes it clear that on the basis of his information received, PW2 was prepared to back up with physical force*, his order to the accused to stop and open the door with the direct objective that the boot of the car be opened for search. And he did so. Consequently I ruled that everything the accused said from the moment PW2 laid hands on him was inadmissible. In retrospect I would state it is my opinion that since PW2 had successfully ordered Kang to stop and open the car door, and since he had formed the intention to compel Kang to move to his orders from that point in time, it would be more correct to exclude everything the accused said from then on ...
>
> *As to all the various authorities cited to me I am constrained to say that I regard each of them as being a decision on the facts of that particular case on the issue as to when a person is to be regarded as being under arrest for the purpose of s 37A of the Act. I have not found the distinction between 'constructive arrest' and 'legal arrest' helpful.* It was contended by the learned DPP that in the present case Kang could only be regarded as being under arrest when PW2 so ordered after Kang allegedly admitted to the knowledge of the contents of the packages. *With respect I do not agree that stopping a person to make enquiries, is the same as stopping a particular person on the basis of prior information received that particular person has committed a particular offence ...*
>
> (Emphasis added).

[24] In the instant case, SP2 was acting on information received about the alleged commission of a crime. The purpose of his visit was to raid the house. He conceded in cross-examination that he would have stopped Yap from attempting to leave the house, if Yap had tried to do so. His enquiries to Yap were based on the prior information received about the commission of a particular offence. SP2 stated that Yap had been identified from the motor vehicle he was driving, namely a green Proton Satria. In these circumstances it appears that when SP2 then went to the house and introduced himself as a policeman, Yap was effectively under 'arrest' from that point in time. The contention of the respondent that he was only placed under arrest after the house had been searched is not tenable, in the circumstances. Accordingly, Yap's statements made in response to questions put forward by SP2 are not admissible.

[25] But what of Yap's act of pointing out a room in response to a query by SP2? Is that admissible under s 8(2) of the Evidence Act 1950 as contended by the respondent? Section 8(2) provides as follows:

> ... The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[26] The examples to the section relating to 'subsequent conduct' namely illustrations (e) to (k) make reference to conduct of the accused after the commission of a crime which is relevant to a fact in issue. In the instant case, the act of pointing out a room where the receptacles containing the counterfeit cards were eventually found, does not amount to 'subsequent conduct' after the commission of an offence. In *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153, at p 160 Raja Azlan Shah J (as His Highness then was) stated:

> The evidence of subsequent conduct is relevant under s 8 of the Evidence Ordinance and may properly be taken into account, *after the prosecution has established the guilt of the accused to reinforce the satisfaction of the court as to the proof of guilt made out by the prosecution case* (see *Chandika Prasad v Emperor* 126 IC 684).

[27] As such Yap's act is not conduct 'subsequent' to the commission of a crime, namely the possession of forged credit cards, as that issue had not been established. Accordingly the learned trial judge's reference to Yap's pointing out of a room as comprising his room would appear to be erroneously admitted. As such there appears to be no evidence linking Yap directly to the room such that the contention that he had 'possession' of the room was conclusively established. However, even if Yap's 'possession' of the room in question had been established, this would not have answered the question of whether Yap had 'possession' of the 26 forged credit cards.

[28] The primary issue of concern in relation to this element of the offence is not to ascertain whether Yap had 'possession' of the room in which the receptacles containing the items were found. The pertinent issue for consideration is whether Yap had 'possession' of the 26 forged credit cards. The relevant question that arises for consideration therefore, is whether there is evidence on record to show that Yap was in 'possession' of the unnamed black bag placed on the table in the room and the black wallet with the Public Bank logo found on the floor near the said table. This is because these two receptacles contained the 26 credit cards. 'Possession' in relation to the credit cards is established by evidence that Yap had custody and control of these two

receptacles containing the cards and that he had knowledge that the two receptacles contained, inter alia, the 26 forged credit cards.

[29] Did Yap have custody and control over the two receptacles containing the 26 forged credit cards? The prosecution sought to establish this by showing that Yap had 'possession' of the room, as a consequence of which it could be inferred that the receptacles in the room were also in the 'possession' of Yap. However it was not established that Yap had 'possession' or exclusive use of the room. There was no admissible evidence on record to establish that Yap had sole and exclusive use of the room, apart from a faint effort to suggest that his clothes were kept in a cupboard in the room. But no clothes of Yap were produced to establish such possession. Neither was the prosecution witness, SP2 able to refute the contention put to him that Yap's sibling also kept her clothes in the cupboard. In the absence of sufficient evidence to establish exclusive possession of the room, it could not be legitimately inferred that the two receptacles found in the room belonged to, or were within the custody and control of Yap. The door to the room was not locked at any time.

[30] However even if Yap had exclusive possession of the room it does not necessarily follow that he also had possession of the black bag and wallet found in the room. Was there any evidence linking these receptacles to Yap?

[31] SP2 stated in evidence-in-chief that he found the identity card of Yap in a wallet placed on top of a small table in the room. However, in his sketch-plan of the room where the positions of the various items which were seized were marked, the wallet appears on the floor next to the table. As for Yap's identity card, there is no mention of it comprising a part of the contents of the black wallet, in the search list. The search list sets out the details of all the cards found in the said wallet. Moreover, Yap's identity card was not produced in evidence, and when SP2 was asked about this, he stated that he returned the identity card to Yap. The evidence in relation to where the wallet was found, as well as the contents of the wallet is less than clear. In view of these evidential inconsistencies, it is not possible to rely on the identity card to link the wallet to Yap.

[32] As for the black bag, nothing was found in it to warrant an inference that it belonged to Yap.

[33] There was no further evidence, direct or otherwise serving to link the physical custody and control of these two receptacles to Yap. The only evidence was that they were found in a room utilised by him. This is insufficient to establish physical custody and control. In any event,

'possession' requires proof of custody and control as well as conscious knowledge of the thing that is possessed, in the instant case, the 26 forged credit cards.

[34] In *Chiah Tian v Rex* [1937] 6 MLJ 105, McElwaine CJ stated:

> ... In my opinion possession to be an offence must be possession under such circumstances that a court is justified in finding that the accused (or the servant in cases of constructive possession) was conscious of the possession. As Pollock CB put it in the *Queen v Woodrow* 16 LJ MX 122, 'a man can hardly be said to be in possession of anything without knowing it' and I think that a person is not guilty of the offence of possession if he is not aware of the possession. There must be some evidence from which it can reasonably be inferred that the accused knew the general nature of the thing alleged to be in his possession such as evidence of length of time he had the object, evidence that he was expecting it, evidence of course of business or any other evidence from which an inference of knowledge of the general nature of the thing can be inferred.

[35] There was no direct evidence led by the prosecution to show that Yap had knowledge of the contents of the two receptacles, as comprising, inter alia, 26 forged credit cards. Could it then be validly inferred from the evidence on record that Yap had such possession?

[36] The learned trial judge found that the existence of three large items, namely the skimmer, embosser and imprinter all contributed to showing that Yap had knowledge that there were forged credit cards contained in the items found in his room. These three items she noted, were heavy and could not easily be taken in and out of a room. Yap, she concluded, would have known of these items in the room used by him. While the existence of such heavy machines in a room utilised by Yap may well suggest that he knew of their existence, this fact does not assist in establishing that Yap had physical control and custody as well as knowledge of the 26 credit cards in the two receptacles. Something more than the mere presence of these items in a room utilised by Yap was necessary to prove that Yap had 'possession' of the subject credit cards.

[37] In *Public Prosecutor v Hoo Chee Keong* [1997] 4 MLJ 451 and *Tee Thian See v Pendakwa Raya* [1996] 3 MLJ 209 which are cases relating to similar offences under ss 472 and 474 of the Code, the issue of 'possession' was clearly established as the forged items in issue were found on the person of the accused. However the facts of this case are different in that 'possession' is not so readily established. In the circumstances, it appears that the second element or ingredient of this offence is not made out.

[38] In view of this conclusion it would follow that a prima facie case is not made out. Notwithstanding this, for purposes of completion the consequent ingredients (iii) and (iv) are also considered.

Ingredient (iii): That the accused held its possession knowing it to be forged and intending that those cards be used fraudulently or dishonestly as a genuine document

[39] It was contended for Yap that the prosecution had failed to prove this ingredient in that the prosecution had failed to adduce any evidence to show that Yap had utilised any of the forged cards. He had not been caught undertaking a fraudulent transaction. Is it therefore necessary for the purposes of establishing the element of an intention to use the cards fraudulently, that the prosecution adduce evidence of the accused person undertaking a fraudulent transaction with the subject forged security documents?

[40] In *Hoo Chee Keong v Public Prosecutor (No 2)* [2000] 5 MLJ 448 where the accused was charged for using forged credit cards under s 474 of the Code, KN Segara J (as His Lordship then was) explained how this element was to be assessed:

> ... The defence however, contends that the accused did not have knowledge that they were forged and that the accused did not intend to use the cards fraudulently or dishonestly, as genuine. Now, as a matter of law, *knowledge and intention must of necessity be inferred from all the circumstances surrounding the case. When forged credit cards are found in the custody and control of the accused and are in fact recovered from his person, then the explanation offered by the accused for such custody and control is extremely crucial and critical to prove or disprove whether he had knowledge that they were forged and whether he did intend to use them as genuine (at his discretion whenever the occasion and circumstances permitted, perhaps in collusion with others)*...

[41] From the foregoing it is evident that the proof of this element is very much a matter of inference from the circumstances in which the accused person was found in possession of the forged documents. Once possession is proven, then intention may be inferred from the surrounding circumstances of the case. It is not necessary for the prosecution to go on and actually prove that the accused person was trying to utilise the forged documents by way of evidence of his undertaking a fraudulent transaction. This statement is fortified by the decision of Augustine Paul JC (as His Lordship then was) in *Public Prosecutor v Hoo Chee Keong* [1997] 4 MLJ 451 where the assessment of this element of the offence was comprehensively set out:

... *Proof of knowledge is very often a matter for inference. Possession of several forged documents, as in the circumstances of the appeal before me, readily leads to an inference against the accused of the required knowledge and intention.* In this regard, I refer to *Dr Sir Hari Singh Gour's Penal Law of India*, (10th Ed, Vol IV) where the learned author says at p 3970:

> Besides possession, there must be knowledge that the document is a forgery. This may be the subject of proof, but it is more likely to be a matter for inference. For instance, if a person is found in possession of several counterfeit seals and forged documents, which he cannot satisfactorily account for, the court may well be justified in presuming guilty knowledge and an intention to use them fraudulently (*Kisto Sooner Deb* 8 WR 110).

The passage which I have just referred to clearly has in contemplation s 106 of the Evidence Act 1950 which reads as follows:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> ... This section is an exception to s 101 of the Evidence Act 1950 which lays down the general rule that in a criminal case the burden of proof is on the prosecution and this provision is not intended to relieve it of that duty. It is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience ...
>
> The two illustrations to the section make its application clear. Where a person is found travelling without a ticket and is charged with so travelling, the prosecution need not and indeed cannot prove that the man never had a ticket. If the accused person once had a ticket and lost it, then such a fact is especially within his knowledge and it is for him to prove such a fact. Similarly when a person does an act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all other possible intentions. If the accused had a different intention, that is a fact especially within his knowledge which he must prove. In *Pashkodi v Krishnaji* AIR 1947 Nag 145, it was held that where a document containing material alterations is produced from the custody of the person in whose possession it was, he has to explain, where and how the alteration was made. In *Public Prosecutor v Yap Chai Kee* [1923] 4 FMSLR 75, the Court of Appeal held that the evidence for the prosecution that the accused was in possession of two forged rubber coupons raised a presumption that he knew that they were forged. In the appeal before me, the prosecution had successfully established that the accused was in possession of three forged credit cards in three different names. The circumstances lead to the inference that the accused had knowledge that they were forged and had intended to use them as genuine. If the accused did not have any knowledge that the cards were forged or that he had intended to use them as genuine then it is a matter especially within his knowledge and it is for him to prove such fact under s 106 of the Evidence Act 1950.

[42] The contention therefore that the prosecution has to actually adduce evidence of the accused person undertaking or attempting to undertake a fraudulent transaction in order to establish this element of the offence is misconceived. Once 'possession' of the forged security documents is established, then it is a matter of inference from the circumstances surrounding the events as to whether or not the requisite intent is proven. It is then for the accused person to explain satisfactorily why he is in possession of the fraudulent securities as such a fact is within his own knowledge.

[43] In the instant case, as the element of 'possession' has not been established, it follows that the element of intent does not arise for consideration. The final element, namely that the forged documents should fall within the purview of s 467 is also not for consideration. However the 26 forged credit cards are documents described in s 467 of the Code (see *Public Prosecutor v Hoo Chee Keong)*.

[44] In view of the foregoing analysis of the evidence adduced during the course of the prosecution case, it follows that a prima facie case was not made out by the prosecution. Such a conclusion results in a reversal not only of the decision of the learned trial judge, but also of certain findings of fact made by her. An appellate court is empowered to interfere with the decision and findings of the trial court where, inter alia, the findings are against the weight of the evidence adduced. A trial judge should evaluate and assess critically the evidence and set out the conclusions to be drawn from such evidence. This explains the basis for his reasoning and ultimate decision. A failure to do so, as in the instant case, rendered the judgment defective. As such this court undertook a fresh evaluation of the evidence and having done so, concluded that the trial court failed to draw the proper inferences from the evidence presented, resulting in a different conclusion (see *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346; *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183; *Periasamy v Public Prosecutor* [1966] 1 MLJ 138). As a prima facie case was not made out, the prosecution's case fails. In view of this conclusion, it is not necessary to evaluate the defence put forward by the accused. However there is one final issue that arises from a failure to evaluate the evidence at the prima facie stage that is discussed below.

Issue (iii) *The burden of proof*

[45] In this case, no evaluation of the evidence adduced by the prosecution was undertaken. However a critical evaluation of the accused's version of events was conducted, and rejected on the grounds as set out above. The consequence of undertaking a thorough evaluation of the defence case while apparently adopting in toto the evidence adduced during the prosecution's case, is that the burden of proof in this case was effectively imposed on the

accused, ie, Yap, rather than on the prosecution. The evidential burden on the defence at the close of the prosecution's case is to create a reasonable doubt as to the veracity of the prosecution's case. At no time does the burden of proving the guilt of the accused person shift away from the prosecution. The net effect in this case was to effectively reverse the burden of proof. This resulted in a miscarriage of justice.

[46] For the reasons above it is my view that the finding of guilt and the conviction of the accused by the learned trial judge was wrong. I therefore set aside the sentence of six years imprisonment imposed on the accused and acquit and discharge him.

Appeal allowed. Accused acquitted and discharged.

Reported by K Nesan